U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

Issue Date: 11 April 2007

Case No.: 2007 TLC 9

In the Matter of

MACKENZIE FARMS
Employer

Appearances: Mr. Mike Stephens, Owner
Ms. Mollie Hollibough, Agent
For the Employer

Ms. Marie C. Gonzalez, Certifying Officer
Mr. Vincent Constantino, Attorney
For the Respondent, Department of Labor ("DOL")

Before: Richard T. Stansell-Gamm
Administrative Law Judge

FINAL DECISION AND ORDER –
REVERSAL OF DENIAL AND MODIFICATION OF
TEMPORARY ALIEN LABOR CERTIFICATION

This matter arises under the temporary agricultural labor or service provision of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(ii), ("the Act"), as implemented by 20 C.F.R. Part 655. As requested by the Employer, I conducted an expedited administrative review under 20 C.F.R. § 655.112(a). My decision is based on the administrative file forwarded by the certifying officer and the written submissions of the parties.

Procedural History

On January 30, 2007, MacKenzie Farms, through its agent Washington Farm Labor Resource, submitted an application for an H-2A temporary alien labor certification for 20 job opportunities (Case No. C-07030-04589). On February 6, 2007, the Employment and Training Administration ("ETA"), DOL, accepted the application for consideration. Subsequently, the Washington State Workforce Agency ("WSWA") and Employment Security Division ("WESD") referred 70 U.S. workers to the Employer. On March 10, 2007, MacKenzie Farms provided a list of reasons for not hiring 45 of the referred individuals. Upon follow-up, the WSWA raised questions concerning the Employer's rejection of 17 of the named individuals. On March 22, 2007, MacKenzie Farms presented reasons for not hiring the other 25 referrals. Considering the WSWA's findings, on March 23, 2007, the ETA certifying officer denied the Employer's request for the H-2A temporary alien labor certification. On March 28, 2007,

MacKenzie Farms appealed and requested administrative review. I received the administrative case file on April 6, 2007.[1]

Parties' Positions

Certifying Officer

The certifying officer denied the MacKenzie Farms' H-2A temporary alien labor certification because for three reasons she was unable to certify that the employment of 20 alien workers would not adversely affect the wages and working conditions of similarly employed workers in the United States. First, based on WSWA's follow-up conversation with at least 17 individuals on the referral list, the certifying officer concluded a sufficient number of able, willing, and qualified U.S. workers were available for employment at the required time and place. Second, the certifying officer concluded the Employer was imposing fewer obligations on alien workers than those imposed on U.S. workers. In particular, the Employer imposed the following requirements on U.S. applicants that were not listed in the H-2A application: references, an employment application, and prior experience. Third, the associated housing for non-commuting workers has been certified for only 18 workers.

MacKenzie Farms

Through the H-2A certification process, MacKenzie Farms hoped to find qualified domestic workers. However, most of the WESD referrals did not show up and many others stated they were physically incapable of the heavy lifting set out in the job description. MacKenzie Farms has provided sufficient legitimate reasons for non-selection of U.S. workers and continues to seek approval of its temporary alien labor certification. In light of the state housing certification, MacKenzie Farms is willing to accept modification of the application to 18 workers.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Summary of Evidence

Application for Temporary Alien Labor Certification

On January 30, 2007, Mr. Mike Stephens, owner of MacKenzie Farms, through an agent, Washington Farm Labor Resources, submitted an application for an H-2A temporary labor certification for 20[2] alien workers residing in Vera Cruz, Mexico for the period March 18, 2007 to December 1, 2007. The individuals would be employed as agricultural workers (horticultural worker II), planting, cultivating and pruning ornamental trees and shrubs. The typical work week was 40 hours, with an hourly rate of $9.77. MacKenzie Farms did not require any

[1]20 C.F.R. § 655.112(a)(2) requires an administrative law judge render a decision within five working days of receipt of the administrative case file.

[2]The initial application listed 17 named individuals. However, a correction to the application to increase the number of workers to 20 was subsequently approved.

education, training, or experience. The special requirements included the physical ability to bend, stoop, and stand for long periods and perform the other job specifications, including transporting trees and scrubs weighing up to 80 pounds. In an effort to locate adequate labor before bringing in migrant workers, MacKenzie Farms agreed to advertise the job opportunities in the local newspapers and to cooperate with local employment agencies. The Employer also agreed to interview all referrals in regards to: availability for, and commitment to, employment during the entire period; transportation to the job site; terms and conditions of employment; worker's declaration of physical capability to perform the job requirements; and, documentation for completion of INS Form I-9. The Employer also indicated that its housing had been certified by the Washington State Department of Health for 18 employees.

ETA Correspondence

On February 6, 2007, ETA informed the MacKenzie Farms agent that the application for temporary alien labor certification had been accepted for consideration. ETA considered the application timely and the stated "positive recruitment plan" was acceptable. To receive the certification by February 16, 2007, the Employer was required to execute its recruitment plan, place advertisements, cooperate with state and local employment agencies, contact former U.S. employees, and interview all referred U.S. workers. ETS noted that any U.S. workers rejected by MacKenzie Farms for "other than lawful, job-related reasons or whom you have not provided with a lawful, job-related reason for rejection, will be counted as available." MacKenzie Farms was also required to document all referrals and state the reason a worker was not hired.

FAX Correspondence – March 10, 2007

In a March 10, 2007 fax to ETA, MacKenzie Farms annotated the results of the 45 U.S. workers referrals.[3] None of the referred workers were retained for employment. The reasons for non-employment and the number of workers not selected fell into the following categories: a) did not agree to contract (2); b) did not respond (4); c) did not show (20); d) did not contact Employer after initial application (5); e) did not have qualifications (4); f); did not have required paperwork (9); and g) was hired, then fired for bad performance (1).

E-Mail Correspondence – March 13, 2007

WESD expressed a concern to ETA that MacKenzie Farms had not hired any of the 45 referred U.S. workers.

FAX Correspondence – March 19 and 20, 2007

On March 19, 2007, WESD informed ETA that in addition to the initial 45 referrals, it had provided another 25 U.S. worker referrals to MacKenzie Farms on March 7, 2007.

[3]MacKenzie Farms also indicated that three non-referred U.S. workers had been hired and then subsequently fired for bad performance or inability to work the number of required hours.

E-Mail Correspondence – March 21, 2007

On March 21, 2007, Mr. Fabina C. Sanchez, WESD, advised ETA that he had attempted to, or successfully, contacted the 45 individuals referred to MacKenzie Farms and obtained the following responses. Substantially consistent with MacKenzie Farms' March 10, 2007 annotations concerning the 29 no shows and individuals without paperwork, Mr. Sanchez was unable to contact 21 individuals.[4] Another four persons had either declined the job or found other work. One U.S. worker, Mr. S. Avalos, was hired by MacKenzie Farms. The remaining three individuals, Mr. R. Zamora, Mr. G. Gullen, and Mr. J. Solis, had submitted applications to MacKenzie Farms and were either waiting for a call to come to work or had not heard anything further.

Concerning the five workers who did not contact MacKenzie Farms after submission of their applications, one individual was working elsewhere and unavailable, and another person did not respond to the inquiry. The remaining three individuals, Mr. R. Prudencio, Mr. L. Carbajal, and Mr. F. Castro were told MacKenzie Farms would call them when work was available.

Two of the four individuals MacKenzie Farms indicated were not qualified were no longer available. The remaining two workers, Ms. A. Carbajal and Ms. N. Camado had submitted applications and were waiting for a phone call from MacKenzie Farms. Similarly, the four workers who were reported as not responding, Mr. L. Valladares-Armenta, Mr. J. Garcia, Mr. E. Herrera, and Mr. M. Diaz had applied with MacKenzie Farms and were awaiting a phone call.

The two individuals MacKenzie Farms indicated would not agree to the work were engaged in other employment.

Finally, Mr. Sanchez was not able to contact the one referred worker who had been hired and then fired.

FAX Correspondence – March 22, 2007

In a March 22, 2007 fax to ETA, MacKenzie Farms annotated the employment results of the additional 25 U.S. worker referrals. None of the additional referred workers were retained for employment. The reasons for non-employment and the respective number of workers fell into the following categories: a) declined to work (2); b) did not submit complete documentation (3); c) did not show or respond (11); d) had bad references (4); and e) were either over- or under-qualified (5).

Denial of Temporary Alien Labor Certification – March 23, 2007

On March 23, 2007, for two reasons, the certifying officer, ETA, denied MacKenzie Farms' application for temporary alien labor certification. First, based on Mr. Sanchez's report,

[4]Since Mr. Sanchez did not provided any specific annotation for Mr. F. Lopez, I will treat the omission as an indication that Mr. Sanchez was unable to contact Mr. Lopez.

which was incorporated into the denial letter, ETA determined that a sufficient number of U.S. workers were available. Second, in light of the rejections of the additional 25 referred U.S. workers, ETA concluded MacKenzie Farms was imposing fewer qualification requirements on alien laborers. In particular, the labor certification did not require applications, references or any qualifications beyond physical ability and availability. The certifying officer also noted that housing had only been approved for 18 workers.

Appeal – March 26, 2007

On March 26, 2007, MacKenzie Farms appealed the adverse determination and provided additional information for rejecting several of the referred U.S. workers. Mr. R. Zamora and Mr. F. Hernandez provided incomplete INS paperwork. Mr. G. Gullen was not hired due to his threatening behavior while on the premises. Of the workers Mr. Sanchez indicated were waiting for phone calls, Mr. F. Castro and Mr. J. Solis did not have complete INS paperwork, Mr. L. Carbajal was not interested in the full term of the employment, and Mr. R. Prudencio remained out of contact. According to MacKenzie Farms, Ms. A. Carbajal, Ms. N. Camado, and Mr. J. Torres were not called for work because they indicated they could not meet the weight lifting requirements of the work. MacKenzie Farms had repeatedly attempted without success to contact Mr. L. Valladares-Armenta and Mr. J. Garcia. Finally, MacKenzie Farms hired and trained Mr. S. Avalos. However, a few days later, he quit.

Statement of Mr. Mike Stephens – April 4, 2007

Mr. Mike Stephens, owner of McKenzie Farms, submitted the H-2A application with the hope that the certification process would produce qualified U.S. workers. However, most of the referrals did not show up and other workers indicated they were physically unable to meet the specified job requirement of heavy lifting. The one worker hired by McKenzie Farms, Mr. Avalos, quit after a few days. Since the job did not start until March 19th, Mr. Stephens offered early employment at the state minimum wage rate of $7.93 an hour. However, WESD advised Mr. Stephens that the appropriate rate was the state's higher AEWR (Adverse Effect Wage Rate).

Discussion

Governed by 8 U.S.C. § 1101(a)(H)(ii)(a) and 20 C.F.R. § 655.90 *et seq.*, the Act's H-2A program allows an employer to hire temporary alien agricultural workers if DOL determines that there are insufficient qualified, eligible U.S. workers who will be available at the time and place needed to perform the identified work, and that the wages and other terms and conditions under which the alien workers will be employed will not adversely affect similarly situated U.S. workers. 8 U.S.C. § 1188; 20 C.F.R. § 655.100(a)(4)(ii). If during the DOL determination process, the certifying officer denies the application for temporary alien agricultural labor certification, the employer may request an administrative review by an administrative law judge. 20 C.F.R. § 655.112(a). During the review, the administrative law judge may not remand the case for additional evidence. 20 C.F.R. § 655.112(a)(1).

The burden of proof in the labor certification process remains with the employer. *Garber Farms,* Case No. 2001 TLC 5 (ALJ May 30, 2001); *Giaquinto Family Restaurant,* Case No. 1996 INA 64 (May 15, 1997); *Marsh Edelman,* Case No. 1994 INA 537 (Mar. 1, 1996). Consequently, in the appeal of a denial of a temporary alien labor certification based on the non-availability of referred U.S. workers, the employer must establish by a preponderance of the evidence based on lawful job-related reasons that the referred individuals were not qualified, eligible, or available at the specified time and place of employment. Additionally, as noted in the ETA letter accepting the certification application, any referred U.S. worker rejected for employment for other than a legitimate job-related reason would "be counted as available."

In light of the above principles, the determination whether MacKenzie Farms has meet its burden of establishing that an insufficient number qualified U.S. workers are available for the specified period involves a three step process. First, the certification application and accompanying job description is reviewed for the relevant, legitimate criteria applicable for the selection of workers. Second, the employer's stated basis for rejection/non-selection of the referred U.S. workers is evaluated in terms of the previously identified legitimate selection criteria. Third, any U.S. worker rejected for a reason not established by the certification application will be considered to have been available for hire, thereby correspondingly reducing the number of alien workers required by the employer under the temporary alien labor certification.

Employment Criteria

The temporary alien labor certification application and the attached MacKenzie Farms job description contained three specific qualification criteria relevant for this particular adjudication. First, the employee had to be available for the entire employment period, March 18 to December 1, 2007. Second, the employee had to be physically capable of bending and standing long hours and transporting trees and shrubs weighing between 5 to 80 pounds. Third, referred U.S. workers had to provide sufficient documentation for INS purposes.

Also relevant to the present inquiry, the certificate and job description did <u>not</u> impose any requirements concerning education, experience, or references.

Employer's Rejections

Having compared MacKenzie Farms' initial annotations and its appeal comments with Mr. Sanchez's review of the 45 referred U.S. workers, I find the Employer provided sufficient reasons for the non-employment of 43 of the referrals. However, MacKenzie Farms has not provided a sufficient reason for the non-selection on the two remaining referrals. Initially, MacKenzie Farms indicated that Mr. E. Herrera and Mr. M. Diaz did not respond. However, Mr. Sanchez subsequently determined that they filed applications with MacKenzie Farms and where awaiting a phone call from the Employer to come to work. In its response to Mr. Sanchez's observations regarding the 45 referrals, MacKenzie Farms gave no explanation for not calling Mr. Herrera and Mr. Diaz.

Concerning the additional 25 referred U.S. workers, I again find that the Employer presented sufficient reasons for not selecting 16 workers based on their failure to show or respond, provide complete documentation,[5] and declination of work. Additionally, the rejection of Mr. J. Torres in part due to his inability to meet the weight lifting requirement was warranted.

However, MacKenzie Farms rejected four referrals due to bad references: Mr. A. Jimenez, Mr. A. Astete, Mr. J. Benitez, and Mr. R. Rosales. Since the certification did not include references as a qualification criteria, the Employer inappropriately imposed greater selection criteria on referred U.S. workers than imposed on alien workers. Consequently, Mr. A. Jimenez, Mr. A. Astete, Mr. J. Benitez, and Mr. R. Rosales will be counted as available U.S. workers.

Finally, MacKenzie Farms rejected Mr. A. Mendoza, Mr. A. Perez, Mr. M. Perez, and Mr. N. Roman because they were "unqualified." Due to the absence of any further explanation, and considering that MacKenzie Farms carries the burden of proof in establishing a legitimate basis for rejection, I find the Employer has not sufficiently established that Mr. A. Mendoza, Mr. A. Perez, Mr. M. Perez, and Mr. N. Roman were unavailable.

Available U.S. Workers

Based on the above assessments, I conclude the following ten referred U.S. workers were not properly rejected by MacKenzie Farms and thus are considered as available for employment: Mr. E. Herrera, Mr. M. Diaz, Mr. A. Jimenez, Mr. A. Astete, Mr. J. Benitez, Mr. R. Rosales, Mr. A. Mendoza, Mr. A. Perez, Mr. M. Perez, and Mr. N. Roman.

Number of Required Alien Workers

Through its temporary alien labor certification, MacKenzie Farms sought to bring in 20 workers from Mexico for little over eight months to work as agricultural laborers. Because the required housing has only been approved for 18 workers, the maximum number possible under this certification is 18 alien workers. In turn, because the 10 referred U.S. workers named above were improperly rejected and are considered to be available, the maximum number of 18 is further reduced by 10. Accordingly, I find MacKenzie Farms has established the requirement for 8 alien workers due to an insufficient number of U.S. workers.

CONCLUSION

During the required recruitment phase in the processing of its application for H-2A temporary alien labor certification, MacKenzie Farms sufficiently established legitimate, job-related reasons for the non-employment of 60 of the referred U.S. workers. However, MacKenzie Farms did not provide a response regarding two available applicants, applied more stringent criteria concerning four applicants, did not sufficiently explain the disqualification of four other workers. Due to these deficiencies, ten referred U.S. workers are deemed to be

[5]Although as noted by ETA the certification and job description did not include an application as a requirement, the Employer was nevertheless required to obtain documentation from referred U.S. worker for completion of appropriate INS forms.

available for employment, which reduces the number of alien workers required by MacKenzie Farms. Additionally, since the Employers' housing has been approved for only 18 employees, MacKenzie Farms' application total of 20 workers is further reduced by two. In light of these reductions, while the temporary alien labor certification application remains viable, it may only be approved for eight job opportunities. Accordingly, the ETA denial of MacKenzie Farms' application must be reversed and modified to approve a temporary alien labor certification for eight non-U.S. workers.

ORDER

The March 23, 2007 ETA Denial of MacKenzie Farms' Application for H-2A Temporary Alien Labor Certification is **REVERSED** and **MODIFIED** as follows: the January 30, 2007 Application For H-2A Temporary Alien Labor Certification, C-07030-04589, is **APPROVED** for eight (8) horticultural worker job opportunities.

SO ORDERED:

A

RICHARD T. STANSELL-GAMM
Administrative Law Judge

Date Signed: April 11, 2007
Washington, D.C.

NOTE: In accordance with 20 C.F.R. § 655.112(a)(2), this Decision and Order constitutes the final decision and order of the Secretary of Labor.